FREE COPY

Office-Supreme Court,
FILED
FEB 3 1969
JOHN F. DAVIS, CLE

No. 28

In the Supreme Court of the United States

OCTOBER TERM, 1968

UNITED STATES OF AMERICA,
Appellant,

vs.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, ET AL.,
Appellees.

On Appeal From The United States District Court
For The District Of Columbia.

MOTION TO AFFIRM

EDWIN O. SCHIEWE
RAYMOND K. MERRILL
THOMAS H. PLOSS
888 Union Station
Chicago, Illinois 60606

EDWARD H. FOLEY
CORCORAN, FOLEY, YOUNGMAN & ROWE
1511 K Street, N.W.
Washington, D.C. 20005
Attorneys for Chicago, Milwaukee,
St. Paul and Pacific Railroad Company

The Scheffer Press, Inc.—ANdover 3-0850

GENERAL INDEX

	PAGE
STATEMENT	1
ARGUMENT	3
CONCLUSION	13

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 899

UNITED STATES OF AMERICA,

Appellant,

vs.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, ET AL.,

Appellees.

On Appeal From The United States District Court
For The District Of Columbia.

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, appellee Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee) moves that the judgment of the District Court be affirmed.

STATEMENT

This is a direct appeal on behalf of United States by the Department of Justice (Department) from a final judgment entered November 20, 1968, by a three-judge district court, denying an injunction against certain orders of the Interstate Commerce Commission (Commission) approving the merger of the Great Northern Rail-

way Company (Great Northern), Northern Pacific Railway Company (Northern Pacific), jointly referred to as "Northern Lines," and Chicago, Burlington & Quincy Railroad Company (Burlington), subject to certain conditions.

The 10,511-mile Milwaukee is the nation's fourth longest rail carrier.[1] It operates in the states of Idaho, Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, Montana, Nebraska, North Dakota, South Dakota, Washington and Wisconsin (App. 104, 106).[2] In all but two of those states, (Indiana and Michigan), it is competitive with one or more of the Northern Lines and Burlington. This competition extends to 187 stations, 135 of which are located in Washington, Montana, North Dakota and Minnesota, including such large stations as the Twin Cities, Duluth, Fargo, Butte, Great Falls, Spokane, Seattle and Tacoma (Ex. 88, 91).[3]

---

[1] Exceeded only by the Penn Central, Santa Fe and Southern Pacific.

[2] "App." refers to appendices accompanying the Department's Jurisdictional Statement.

[3] "Ex." and "Tr." refer, specifically, to exhibits and transcripts of hearings in the Commission's record.

ARGUMENT

The Department predicates its argument upon two misconceptions of fact.

First, the Department implies that competition for a substantial volume of traffic, now carried by Northern Lines, would be completely eliminated by the merger, or that only weak and ineffective competition from the Milwaukee and other forms of transportation would remain; and, second, that only "conventional" benefits would result from the merger.

(1) Vigorous Competition Will Remain After Merger and New Competition Will Be Created by the Milwaukee Conditions.

If rail service between the Midwest and Pacific Northwest were now performed solely by the Northern Lines, their merger would truly eliminate substantial rail competition. The fact is, however, that for all except a small portion of the traffic now handled by the Northern Lines, vigorous and effective competition will remain or become available for the first time as a result of the merger and the conditions imposed by the Commission.

Although recognizing the Milwaukee as the principal competitor of the Northern Lines, the Department characterizes it as an "extremely weak carrier" compared to the Northern Lines and one which "has not become a major rate-making line or transcontinental railroad of substantial competitive significance."

The competitive significance of the Milwaukee cannot be so lightly brushed aside. True, it has been unable to

match the net income of the Great Northern, Northern Pacific, or Burlington, but as stated by the Department in its brief to the Commission (p. 37), the Milwaukee is "a very aggressive and effective competitor [of the Northern Lines], and there is intensive competition between them for traffic."

The evidence before the Commission discloses that the Milwaukee has pursued an intensive program of plant improvement, modernization, and new and diversified services for the public. Capital expenditures during the ten-year period ending in 1960 totaled $242,228,000. Included was the construction of three electronic gravity freight-classification yards, one of which is located at the Twin Cities, the eastern terminus of the Northern Lines. These yards permit faster handling of cars and a reduction of damage to shipments from the switching operations. During the same period, the Milwaukee acquired $57,940,000 worth of new freight cars. As of December 31, 1961, its fleet totaled 45,642 freight cars, supplemented by many more flat cars and piggyback trailers furnished by various pools in which the Milwaukee maintains membership (Tr. 6722, 6723).

Further, the Milwaukee has made heavy investments in train-wayside radio systems, hotbox-detector systems, electronic data-processing equipment, new car repair facilities, and centralized traffic control. It pioneered in the handling of automobiles loaded on highway transports, mounted on flat-cars to the Pacific Northwest and has improved its lines in Wisconsin, Montana, Idaho and Washington to permit the handling of high and wide loads the entire distance from Chicago to Puget Sound (Tr. 6229-6234).

More recently, the Milwaukee initiated faster transcontinental freight schedules between Chicago and Seattle-

Tacoma. The Northern Lines, although unable to match the Milwaukee schedules, were compelled to improve their service to meet the Milwaukee's competition. This they can do only with shorter and lighter trains than the high-volume, heavy-power trains normally operated (App. 82).

It is not unexpected, therefore, that the importance of the Milwaukee, as a railroad and a competitor of the Northern Lines, was recognized by the Commission:

> "The record clearly shows that the Milwaukee now provides an essential and efficient rail transportation service in the area where it is a principal competitor of the applicant railroads. Evidence to that effect was adduced by the testimony of 6 of Milwaukee's officials, 1 consultant, public witnesses[4] called by it, at least 86 of the shipper witnesses called by applicants, 18 independent interveners representing various Federal and State agencies, and by a number of associations of shippers. We agree with the following summary of this evidence by the examiner:
>
> > 'In spite of wide divergence of position expressed on the proposed unification, each of the intervening Federal and most State agencies, as well as numerous important shippers, whose shipments approximate many thousands of carloads annually, called by both applicants and interveners, forcibly evidenced the vital importance of and dependence upon the Milwaukee both at points competitive with one or more applicant railroads, and at stations and areas noncompetitive with applicant railroads. They look to the Milwaukee for active, vigorous and healthy railroad competition both in rate negotiations and in quality of service to the shipping public.'" (App. 107-108).

[4] 117 in number.

Notwithstanding the continued willingness of the Milwaukee to carry the fight to its competitors, its participation in traffic to and from the Pacific Northwest, as stressed by the Department, has been only 12 per cent compared to 27 per cent for the Union Pacific, 31 per cent for the Great Northern, and 30 per cent for the Northern Pacific (App. 146).

The Commission accurately states the reason for the Milwaukee's smaller share as the "artificial and geographical handicaps [which] limit Milwaukee's ability to participate in traffic to and from the growing Pacific Northwest." (App. 106). These handicaps and the protective conditions for the Milwaukee which the Commission would impose are discussed at length by the District Court (App. 26-31) and by the Commission (App. 108-125). Briefly summarized, these conditions would require the merged company:

(1) To enter into new through routes with the Milwaukee, opening eleven gateways in North Dakota, Montana, and Washington, enabling the Milwaukee for the first time to compete for the long haul of a substantial volume of traffic west of the Twin Cities, which it is now required to surrender to or receive from the Northern Lines at the Twin Cities or Sioux City;

(2) To grant trackage rights to the Milwaukee for a distance of 46 miles from Longview Junction, Washington, to Portland, Oregon, enabling the Milwaukee, for the first time, to become a true transcontinental competitor for traffic to and from Oregon and California, which it is now effectively precluded from handling west of the Twin Cities;

(3) To provide trackage rights to the Milwaukee north of Seattle which, coupled with its access to Portland, will enable it to offer a competitive service for a large volume of north-south traffic moving on the West Coast;

(4) To provide Milwaukee, through a car-handling arrangement, access to Billings, which is one of the two largest cities in Montana and its most important distribution center; and

(5) To eliminate the dual basis of switching charges which penalizes shippers who favor, with competitive traffic, a railroad other than the one performing the switching service at origin or destination, and which has discouraged the movement of traffic and location of industry on the lines of the Milwaukee.

An additional condition would require the merged company to cooperate in restoring certain competitive rate relationships which might otherwise change to the detriment of the Milwaukee as a result of the merger.

The Milwaukee and the Northern Lines have reached an agreement implementing the foregoing conditions and making available to the Milwaukee facilities and services which it will need at Portland and Billings (Ex. 250). Moreover, as the District Court was informed, the Milwaukee has been requested by the Southern Pacific to operate its trains into the Southern Pacific's Brooklyn Yard at Portland. This would enable the Milwaukee to offer a fast interline service through a direct connection with one of the most important Western carriers, and the Northern Lines have assured the Milwaukee that they and the merged company will not object to the extension

of the Milwaukee's terminal operations in Portland to reach the Southern Pacific.

Thus, the merger, as so conditioned, enabling the Milwaukee to become fully competitive, both as a transcontinental carrier and as a north-south carrier on the West Coast, merits the Department's approbation rather than its attack against the Commission's orders. Far from being eliminated, there will be enhanced intramodal competition from the Milwaukee, extended for the first time to all long-haul traffic handled by either of the Northern lines across the Northern Tier of states. The Department, rightly concerned over the present unfair distribution of traffic, should not seek to thwart its remedy. Instead, it should favor the positive action advocated by four Commissioners (and ultimately adopted by the Commission) who dissented from the initial decision denying the merger:

> "The impressive and startling, and discouraging, factor in the gateway statistics set forth in the report is not that, 'After merger, New Company would be the dominant transportation enterprise operating between the Northwest and Twin Cities' (*the affiliated Northern Line applicants are now*), but rather, the paucity of the Milwaukee's share of that market. Wringing hands over the Northern Lines' shares, separately or in combination, will not help the Milwaukee or its shippers or the areas it serves; using the leverage afforded by the applications, however, the Milwaukee could have the opportunity of increasing its share to the great benefit of the entire transportation system and the users thereof, even to reversing the trend of agricultural-commodity diversion to unregulated carrier services which threaten applicants and other regulated carriers alike." (App. 182).

(2) The Merger, with the Milwaukee's Conditions, Will Provide Far More Than Conventional Merger Benefits.

The Department argues that the elimination of substantial competition between the Northern Lines precludes the merger from being in the public interest unless it would secure important public benefits. The benefits of merger to the public from the improved service to be offered by the merged company are discussed in the Commission's report and District Court's opinion at some length. Those benefits are multiplied far beyond those of the ordinary railroad merger by the imposition of the Milwaukee's conditions.

In its discussion of intermodal competition, the Department minimizes the danger to the rail carriers from water and motor carrier competition in the Northern Tier of states. The Department suggests that the low-rated bulk traffic of the railroads, as distinguished from the high-rated "manufacturers and miscellaneous" categories is unattractive to motor carriers. As shown in the District Court's opinion (App. 35-36), motor carriers are making sizable inroads in both categories. Moreover, the Department fails to see that if the railroads lose a sizable portion of their higher-rated traffic to the continuing erosion by motor carriers, they can no longer handle other traffic at the present low rates, which would have to be increased to cover overhead costs. As rates increase, the traffic may cease to move or would become more attractive to solicitation by the motor and water carriers.

With various super-highway projects now under construction (App. 36), loss of traffic and revenues by the railroads to competing forms of transportation throughout the Northern Tier of states will certainly continue

unless the railroads are allowed to improve their efficiency and competitive opportunities. The Milwaukee, with its lower net income, is in immediate financial danger unless it can arrest the diversion of traffic to water and motor carriers. It must be relieved of its crippling competitive disabilities to enable it to continue to serve all its shippers and compete, aggressively and effectively, against both its intramodal and intermodal competitors. Absent this relief, the Milwaukee's uncertain future as a transcontinental carrier is well described by the four previously-quoted Commissioners:

> "Under the *status quo*, the Milwaukee is destined to a marginal and steadily deteriorating existence,[5] with its shippers and service areas, as well as those of applicants, surely paying the price of its inability to reach Portland (except through a left-handed interchange with Union Pacific at Marengo), its inability to obtain a long haul on transcontinental traffic that does not both originate and terminate on its own lines, its inability to offer stop-off service except at points on its own lines, and its various other natural and artificial handicaps fully developed of record. What Portland traffic it now has is shown to come from loyalty for its past efforts and hope for its improved future as a result of these proceedings, but, in ultimate self-interest, its Portland supporters cannot stay with it unless relief is forthcoming here." (App. 180-181).

Benefits from the Milwaukee's conditions to shippers were evidenced by the outpouring of strong public support for the conditions.

---

[5] This warning was reaffirmed by the Commission in its decision of November 30, 1967, approving the merger (App. 321).

Typical of testimony urging the opening of the eleven gateways and summarizing the public benefits therefrom, is the following from the world's largest canner of fruits and vegetables:

> "This would guarantee a fair measure of competition between all lines and insure a high level of service at noncompetitive stations. It would give northwest shippers and receivers a choice of routes and would allow them to favor those carriers which provided the most satisfactory service and furnished an adequate and dependable supply of suitable equipment. It would further improve stopoff possibilities for shippers and receivers and make rail transportation services more valuable. (Tr. 14183-14186)."

Equally strong shipper support was voiced for the Milwaukee's entry into Portland. Disadvantages now suffered from the Milwaukee's inability to serve Portland and benefits which such service would confer upon the public were detailed by scores of shippers of grain, flour, sugar, paper and paper products, canned and frozen fruits and vegetables, lumber and forest products, and numerous manufactured commodities.

Similarly, shippers testified to the benefits they would derive from trackage rights sought by the Milwaukee north of Seattle, between Renton and Snohomish and between Everett and Bellingham, which would give them an improved competitive North-South service from the Canadian border on the north to Portland on the south; access by Milwaukee to Billings, Montana; and elimination of the dual basis of switching charges.

The benefits to shippers from the Milwaukee's conditions, which are far in excess of conventional merger bene-

fits, are vividly summarized in yet another dissenting opinion joined in by five Commissioners, who said:

> "The evidence is clear and overwhelming on the harm perpetrated by the competitive situation as it is today in applicants' territory and will continue to be as a result of the majority's decision. Gateways are barred; routes are restricted; transit, stop-off and diversion privileges are severely curtailed; shippers are held captive to the Northern Lines over great distances; shipper access to markets and sources of supply is limited; the Milwaukee, notwithstanding its superior grades and shorter route, is hamstrung and shorthauled, and is continuously losing effectiveness as a competitor in this territory, primarily as a result of insuperable interchange restrictions imposed by the Northern Lines;[6] C&NW is subjected by the Northern Lines to similar handicaps. All this could be changed—and all the railroads involved, the shippers, the economy of the territory and the general public would be the beneficiaries—if this merger, properly conditioned and modified, were to take place." (App. 175).

The Department, therefore, is in error not only in suggesting that competition for traffic now handled by the Northern Lines will be eliminated or replaced by weak and ineffective competition, but in suggesting that no important public benefits, beyond the conventional benefits of any railroad merger, would result from the merger of the Northern Lines subject to the Milwaukee's conditions.

---

[6] Milwaukee's aggressive and intensive competition with the Northern Lines has been discussed, *supra*, as have the disabilities which deprive the Milwaukee of a fair share of traffic. Only in the latter respect does the Milwaukee agree that its competition has been less than completely effective. The Milwaukee's conditions will make it competitive in all respects.

CONCLUSION

The Milwaukee, given a full, fair opportunity to serve, together with the other transcontinental railroads, will provide all the rail competition for the merged company neecssary to protect the public interest.

It is, therefore, respectfully requested that the judgment of the District Court upholding the approval by the Commission of the merger, subject to the Milwaukee's conditions, be affirmed.

Respectfully submitted,

EDWIN O. SCHIEWE
RAYMOND K. MERRILL
THOMAS H. PLOSS
888 Union Station
Chicago, Illinois 60606

EDWARD H. FOLEY
CORCORAN, FOLEY, YOUNGMAN & ROWE
1511 K Street, N.W.
Washington, D.C. 20005
Attorneys for
Chicago, Milwaukee, St. Paul
and Pacific Railroad Company.

February, 1969